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No. 89-1499

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

A.F. PLAZZO

and

PLAZZO INSURANCE SERVICES, INC.,
Petitioners,
v.

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
NATIONWIDE LIFE INSURANCE COMPANY,
NATIONWIDE GENERAL INSURANCE COMPANY, and
NATIONWIDE PROPERTY AND CASUALTY COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

**RESPONDENTS' SUPPLEMENTAL BRIEF IN
OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI**

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September 14, 1990

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Respondents Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Life Insurance Company, Nationwide General Insurance Company and Nationwide Property and Casualty Company (collectively, "Nationwide")¹ hereby submit

¹ Pursuant to Rule 29.1 of the Court's Rules, a list setting forth the parent companies, subsidiaries (except wholly owned subsid-

their Supplemental Brief in Opposition to the Petition For Writ of Certiorari filed by A.F. Plazzo and Plazzo Insurance Services, Inc. (collectively, "Petitioners") in the above-named case. Pursuant to Rule 15.7 of the Court's Rules, this brief notes and is restricted to two new cases decided subsequent to the time of Nationwide's last filing.

As discussed in Nationwide's prior brief, this case concerns the applicability of Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), to an incentive compensation arrangement provided by Nationwide to certain of its insurance agents, including Petitioners. That arrangement includes a conventional provision that imposes a financial penalty (loss of future payments) in the event the agent engages in contractually specified competitive activities. Nationwide believes that ERISA is inapplicable to this arrangement because, *inter alia*, Petitioners were not "employees" of Nationwide within the meaning of ERISA, which is a predicate to application of that statute.

ARGUMENT

In *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096 (5th Cir. 1990), the Fifth Circuit Court of Appeals addressed both of the issues cited by the Petitioners as grounds for this Court's review of the decision in *Plazzo*: (1) the definition to be applied in determining ERISA "employee" status, and (2) the standard for appellate review of such a determination. The Fifth Circuit in *Penn* reached the same conclusions on these issues as the Sixth Circuit in *Plazzo*. The Fifth Circuit ruled that the status of an individual as an "employee" under ERISA is a question of law subject to *de novo* review by the appellate court. See 898 F.2d at 1101. The Fifth Circuit then

aries) and affiliates of the Respondents was included as an Appendix to Respondents' Brief in Opposition to Petition for a Writ of Certiorari. No amendments are required to make such listing currently accurate.

held that "because Congress provided no specific statutory definition of 'employee' under ERISA we properly apply the common law of agency," following the reasoning of *Wolcott v. Nationwide Mutual Insurance Co.*, 884 F.2d 245 (6th Cir. 1989) and *Holt v. Winpisinger*, 811 F.2d 1532 (D.C. Cir. 1987). See 898 F.2d at 1101-1102 & n.6. The Fifth Circuit applied the common-law factors enumerated by this Court in *Community for Creative Non-Violence v. Reid*, — U.S. —, 104 L.Ed.2d 811, 109 S. Ct. 2166 (1989). See 898 F.2d at 1102-1103. The Fifth Circuit specifically noted and rejected the "employee" standard announced in *Darden v. Nationwide Mutual Insurance Co.*, 796 F.2d 701 (4th Cir. 1986), *on remand*, 717 F.Supp. 388 (N.D.N.C. 1989), *cross appeals pending*, Nos. 89-2759(L), 89-2760 (4th Cir.). See 898 F.2d at 1102 n.6.

In *Mayeske v. International Association of Fire Fighters*, 905 F.2d 1548 (D.C. Cir. 1990), the D.C. Circuit confirmed its prior decision, that common-law factors are determinative of ERISA "employee" status, in light of this Court's decision in *Community for Creative Non-Violence v. Reid*, *supra*. See 905 F.2d at 1553-1554.

These decisions further demonstrate that the decision of the Sixth Circuit in *Plazzo* was correct in all respects.

CONCLUSION

The Petitioners' request for certiorari presents no issue that warrants this Court's consideration prior to the resolution of the *Darden* appeal currently pending in the Fourth Circuit. Should the Petition be granted, however, Nationwide concurs in the view of the United States (as stated in its *amicus curiae* brief of September 1990) that review should be limited to the question of the standard for determining ERISA "employee" status. In such event, Nationwide further suggests that this matter is suitable for affirmance on the merits without additional briefing or oral argument.

Respectfully submitted,

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